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No. 01-1080

IN THE
Supreme Court of the United States

TRANS UNION LLC,
Petitioner,

v.

FEDERAL TRADE COMMISSION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Whether this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), should be expanded, in a manner that conflicts with decisions of this Court and the lower courts, to eliminate full First Amendment protection for concededly truthful lists of selected names, addresses, and other information regarding consumers based on the theory that such speech by its nature does not relate to matters of "public concern."

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and participates in administrative proceedings in a variety of areas, it devotes a substantial portion of its resources to protecting free speech rights, particularly the speech rights of the business community. WLF has appeared before this Court on numerous occasion in cases raising First Amendment issues. *See, e.g., Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on manufacturer speech. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000).

WLF fully supports Petitioner's request that the Court grant review on both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the first Question Presented and the lower court's effort to carve out a new category of speech to which full First Amendment protection is inapplicable. The decision below constitutes a significant erosion of free speech rights and, if left uncorrected, would leave governments free

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

to prohibit a vast range of speech heretofore thought to be safe from government regulation.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of either party.

WLF is filing this brief with the consent of both parties. Letters of consent have been lodged with the Clerk of Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioner Trans Union LLC challenges the authority of Respondent Federal Trade Commission (FTC) to prohibit certain types of speech engaged in by Trans Union. The FTC alleges that the speech violates the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. Trans Union denies violating the FCRA and contends that, in any event, the FTC's efforts to prohibit its speech violate the First Amendment.

The speech at issue here consists of lists of names and addresses of consumers; companies buy these "target marketing" lists from Trans Union for the purpose of making phone or direct mail solicitations, offering to sell the consumers goods or services or soliciting political or charitable

contributions. Trans Union compiles these lists from data bases it maintains; the lists are of value to a marketer because they consist solely of individuals who share a characteristic (*e.g.*, individuals who possess a department store credit card) that, the marketer believes, will make the individuals more likely to respond to the marketer's sales pitch. *See* Petition Appendix ("Pet. App.") 2a.

In 1994, the FTC determined that this "target marketing" activity violated the FCRA; it ordered Trans Union to stop selling such lists.[2] Trans Union sought judicial review, contending that its activities were not covered by the FCRA and, in any event, were protected by the First Amendment.[3] In 1996, the U.S. Court of Appeals for the District of Columbia Circuit set aside the FTC's order, finding that the FTC had failed to justify its finding that

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[2] Trans Union engages in two types of "target marketing." In addition to the type outlined above, Trans Union provides lists of consumers who are to be contacted in connection with firm offers of credit or insurance. That second type of target marketing is not at issue in this case. The FCRA explicitly permits "firm offer of credit or insurance" target marketing, 15 U.S.C. § 1681b(c)(1)(B)(i), and the FTC does not challenge Trans Union's practices in this regard.

[3] The FCRA strictly regulates the dissemination of "consumer reports" by consumer reporting agencies such as Trans Union. Information supplied by such agencies is not a "consumer report" unless it "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit . . . to be used primarily for personal, family, or household purposes" (or for several other purposes not relevant to this case). 15 U.S.C. § 1681a(d)(1). Trans Union disputed the FTC's contention that the lists of names and addresses it supplied were to be used in establishing consumers' eligibility for credit.

Trans Union's lists were "consumer reports." *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

On remand, the FTC (after conducting further hearings) stood by its initial decision and again ordered Trans Union to cease its target marketing activity. A different D.C. Circuit panel denied Trans Union's petition for review. Pet. App. 1a-15a. The court upheld as supported by substantial evidence the FTC's decision that Trans Union's target marketing lists were "consumer reports" and thus that Trans Union's activity violated the FCRA. *Id.* at 5a-10a.

The court also rejected Trans Union's claim that the ban on dissemination of target marketing lists violated Trans Union's First Amendment rights. The court initially determined that Trans Union's dissemination of target marketing lists was entitled only to "reduced" constitutional protection because such speech "is solely of interest to the company and its business customers and relates to no matter of public concern." *Id.* at 13a. Applying its "reduced" scrutiny to the FTC's speech prohibition, the court upheld the prohibition on the grounds that: (1) the government had a "substantial" interest in protecting the privacy of consumer credit information; (2) the manner chosen by the FTC to promote that interest was not overly burdensome; and (3) the FTC's prohibition could not be faulted as unconstitutionally "under-inclusive" merely because the government had failed to take action against many other activities (engaged in by consumer reporting agencies such as Trans Union as well as by numerous other companies) that result in disclosure of consumer information. *Id.* at 13a-15a.

On October 23, 2001, the D.C. Circuit denied Trans Union's petition for rehearing and rehearing *en banc*. In

connection with that denial, the panel issued a second opinion clarifying its earlier decision. *Id.* at 16a-23a. The court stated that its decision to apply "reduced" or "intermediate" First Amendment scrutiny to the FTC's actions was supported by this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985). While acknowledging that the speech at issue in *Dun & Bradstreet* was "wholly false" speech and that the speech at issue here is truthful, the court claimed that nothing in *Dun & Bradstreet* indicated that the falsity of the speech was a factor in this Court's decision to apply reduced scrutiny to the speech regulations at issue there. *Id.* at 16a-17a. Rather, the "important point" in both *Dun & Bradstreet* and in this case was that the speech subjected to government regulation "solely interests" the speaker and its "specific business audience." *Id.* The court said that First Amendment interests trump privacy concerns only where the speech at issue involves "matters of public concern," and that "speech of largely private concern may warrant only qualified protection." *Id.* at 17a-18a. The court acknowledged that the FTC was distinguishing speech on the basis of content, but contended that such content-based restrictions do not warrant strict scrutiny when the speech at issue is commercial or is otherwise deserving of a lower level of protection. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

This case raises First Amendment issues of exceptional importance. The decision below carves out a broad category of speech deemed of lesser importance and declares that the First Amendment does not fully protect such speech from government suppression. The D.C. Circuit cited only a single decision of this Court in support of its remarkable

holding: *Dun & Bradstreet, Inc. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In fact, *Dun & Bradstreet* is wholly inapposite. Indeed, the decision below is inconsistent with numerous decisions of this Court; review is warranted to resolve the conflict between those decisions and the decision below.

Review is warranted for the additional reason that the decision below threatens to disrupt large segments of American commerce, and authorizes suppression of large amounts of speech -- both commercial and (as here) noncommercial in character -- not previously subject to any form of government regulation. The decision below held that speech that does not relate to a "matter of public concern" is not entitled to full First Amendment protection. The court failed to provide any meaningful definition of that term, but it apparently would limit full First Amendment protection to speech relating to issues that are the subject of debate in public forums. By establishing such a limited scope for First Amendment rights, the court denied full constitutional protection to the great majority of speech engaged in on a daily basis, speech that often is far more important to the daily lives of citizens than is speech concerning the "great issues" of the day. It would certainly come as a surprise to most Americans, for example, that (under the decision below) they cannot rely on full First Amendment protection for truthful information they disseminate about aspects of their neighbors' lives that are not "matters of public concern." Members of the business community, for whom the dissemination and receipt of information about private citizens is an indispensable part of their business affairs, now face the possibility that (based on the D.C. Circuit's rationale) such business activities could subject them to government sanction notwithstanding previous notions of

First Amendment rights. That large amounts of truthful speech will be chilled as a result of the decision below is inevitable. Because the decision below will have such a large impact on the daily lives of all Americans, review is urgently needed.

I. REVIEW IS WARRANTED BECAUSE THE CASE RAISES IMPORTANT ISSUES THAT AFFECT BILLIONS OF DOLLARS IN COMMERCE AND TOUCH ON THE LIVES OF ALL AMERICANS

The First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Nonetheless, there are certain limited categories of speech (*e.g.*, libelous speech, fighting words, obscenity, child pornography) that are either altogether outside the scope of freedom of speech or (as in the case of commercial speech) are entitled to reduced levels of First Amendment protection.

The D.C. Circuit now has added a new category of speech that it deems entitled to "reduced" First Amendment protection: speech that does not "relate to matters of public concern." Although the court failed to define the contours of this new category with any degree of precision, it is apparent that the category is far broader than any heretofore recognized by this Court and, indeed, appears to include the great majority of speech engaged in on a daily basis by most Americans.

The court made abundantly clear that this new category of less-than-fully-protected speech is not in any way synonymous with "commercial speech." Commercial speech, which is entitled to reduced-but-still-substantial First Amendment protection, has generally been defined as speech that "proposes a commercial transaction." *Central Hudson Gas & Electric Corp. v. Public Serv. Commn.*, 447 U.S. 557, 562 (1980). By providing names and addresses to its customers, Trans Union is not thereby advertising its services or otherwise proposing a commercial transaction. Accordingly, the speech at issue in this case does not constitute "commercial speech," and the D.C. Circuit did not contend otherwise.[4] Although the court looked to "commercial speech" case law in determining the proper level of First Amendment scrutiny for the FTC's speech suppression, it was careful to avoid any contention that Trans Union's speech was, in fact, "commercial speech."

This Court has never suggested that speech not falling within the definition of "commercial speech" is nonetheless entitled to reduced First Amendment protection simply because the speech arises in a commercial context. To the contrary, the Court has explicitly rejected the notion that a profit motive lessens the constitutional protection otherwise afforded to speech, stating, "Some of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 482 (1989). *See also, Consolidated Edison Co. v.*

[4] It will often be the case, of course, that a business will use the information it obtains from Trans Union to solicit business from prospective clients. Such solicitations would indeed be commercial speech, but the original communication of the customer information is not. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

Public Service Comm'n of New York, 447 U.S. 530, 537 (1980). The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Indeed, because virtually all newspapers are published for the purpose of making a profit, little would remain of the freedom of the press if information conveyed in connection with a profit-making venture were not entitled to full First Amendment protection.

The D.C. Circuit did not apply reduced scrutiny to the FTC's actions because of the commercial nature of Trans Union's activities; it did so because it thought that the speech engaged in by Trans Union did not "relate to matters of public concern" and thus was not particularly important. The court stated that "the important point" in determining that Trans Union's speech was not entitled to full First Amendment protection was that "the targeted speech solely interests the speaker (Trans Union) and its 'specific business audience' (its customers)." Pet. App. 17a (quoting *Dun & Bradstreet*, 472 U.S. at 762). The same could be said of the great majority of speech engaged in by Americans, whether spoken in a commercial or noncommercial setting. The appeals court has thus created a huge exception to the First Amendment that threatens to undermine free speech protections. In light of the vast amount of speech now subject to government prohibition as a result of the D.C. Circuit's new rule, review is urgently needed.

The effect of the ruling on the business community alone is staggering. For example, the ability of the business community to engage effectively in direct marketing is largely dependent on its ability to obtain the kind of information supplied by Trans Union to its target marketing

customers. A significant portion of all consumer transactions in this country are the result of direct marketing activity. In 2000, direct marketing sales amounted to $938 billion, or an average of $3,478 for every American. Direct Marketing Association, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY (5th ed., 2000). Consumers sales resulting from direct marketing have been growing over the past decade at an average annual rate of 9.1%, almost double the average growth rate for overall consumer sales. *Id.* The direct marketing industry supports 14.7 million U.S. jobs. *Id.* Those sales and jobs would be placed in jeopardy if the D.C. Circuit's restrictions on First Amendment rights were adopted nationwide.

The FCRA does not, of course, impose restrictions on *all* businesses that supply mailing lists to other businesses and charities; it focuses chiefly on "consumer reporting agencies" such as Trans Union. *See* 15 U.S.C. § 1681a(f). But the D.C. Circuit's decision is not so limited; it announces a rule that would grant government the power to prohibit *any* company from supplying consumer mailing lists to customers, free from normal First Amendment constraints. Moreover, the decision below is not limited to consumer mailing lists; virtually any information supplied by one company to another is now subject to strict government control or prohibition because only rarely will such information "relate to matters of public concern," as opposed to matters bearing solely on the private economic interests of the companies involved. The fundamental premise of the First Amendment is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The decision below undercuts

that premise by denying full First Amendment protection to such a broad range of speech.

The decision below also has huge implications for speech outside commercial settings. If, as the D.C. Circuit held, speech by private individuals is subject to "reduced" First Amendment protection if it involves matters of "largely private concern," then much of the speech that we all engage in on a daily basis now lacks the full First Amendment protection that many had come to expect. Presumably, the D.C. Circuit would hold that it is not a matter of "public concern" whether an individual who has not thrust himself into the public limelight is a homosexual or a former member of the Ku Klux Klan, or has served a prison sentence for a criminal conviction. Thus, an individual facing government sanction for revealing truthful information of that nature about a neighbor would not be entitled to full First Amendment protection under the D.C. Circuit's standard.[5]

In cases of that sort, at least it is arguable that the individual about whom information is being revealed has a privacy interest in avoiding the disclosure of intensely embarrassing facts. But the D.C. Circuit made no effort to cabin its decision to cases involving personal information that a reasonable person would have strong reason to keep private. Indeed, the court stripped Trans Union of full First

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[5] The scenario outlined above is hardly fanciful. *See, e.g., Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762 (Cal. App. 1983) (First Amendment does not bar tort action against newspaper that disclosed that student body president was a transsexual); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (tort liability imposed on magazine for revealing that plaintiff had been convicted 11 years earlier of armed robbery; the article served no "public purpose" because the plaintiff was "rehabilitated" and had "paid his debt to society").

Amendment protection even though Trans Union's disclosures were limited to names, addresses, and the minimal inferences that could be drawn from a consumer's inclusion on a specific target list; and even though Trans Union will not include the names of any consumers who make known their objection to inclusion. By making clear that speech of "largely private concern" lacks full First Amendment protection regardless whether it reveals any information whose dissemination would cause any reasonable concern, the D.C. Circuit has created a new First Amendment exemption with alarmingly broad scope. Review is warranted in light of the importance of the opinion below to a broad range of truthful speech.

II. REVIEW IS WARRANTED BECAUSE THE LOWER COURT DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT IN CREATING A NEW CATEGORY OF SPEECH TO WHICH REDUCED FIRST AMENDMENT SCRUTINY IS APPLICABLE

In recognizing a First Amendment exception for speech that does not relate to "matters of public concern," the D.C. Circuit claimed to be relying on this Court's opinion in *Dun & Bradstreet*. In fact, *Dun & Bradstreet* provides no support for the D.C. Circuit's decision. Indeed, the D.C. Circuit's decision conflicts with numerous decisions of this Court. Review is warranted to resolve that conflict.

In *Dun & Bradstreet*, the Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do not involve matters of public concern, even in the

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absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality). The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern. The D.C. Circuit interpreted *Dun & Bradstreet* as establishing a rule that *all* speech not relating to "matters of public concern" is entitled to a reduced level of First Amendment protection, regardless whether the speech is truthful. It rejected Trans Union's efforts to distinguish this case on the ground that, unlike in *Dun & Bradstreet*, the speech at issue here is truthful:

> To be sure, Trans Union's lists are not "wholly false," as was the *Dun & Bradstreet* credit report. . . . Nothing in *Dun & Bradstreet*, however, suggests that th[is] factor[] w[as] critical to the Court's decision. The important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its "specific business audience" (its customers).

Pet. App. 16a-17a (quoting *Dun & Bradstreet*, 472 U.S. at 762).

The D.C. Circuit has badly misinterpreted *Dun & Bradstreet*. That decision -- in which there was no majority opinion[6] -- did not indicate that *all* speech that does not relate

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[6] Only three justices joined the plurality opinion. While Chief Justice Burger and Justice White concurred in the 5-4 judgment, both would have overruled *Gertz* and would have held that presumed and (continued...)

to "matters of public concern" is entitled only to reduced First Amendment protection. Rather, the plurality stated that *false* speech that does not relate to "matters of public concern" is entitled to less First Amendment protection than false speech that *does* relate to "matters of public concern":

> These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. [Citations omitted.] This particular interest warrants no special protection *when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation.*

Id. at 762 (plurality) (emphasis added).

The plurality could not have been clearer that it was judging the level of First Amendment protection to be afforded *false* speech that "concerns no public issue," *not* the level of protection to be afforded *all* speech that "concerns no public issue." As the Court has made plain on numerous occasions, false speech is generally entitled to *no* First Amendment protection, *Bose Corp.*, 466 U.S. at 504 & n.22, because "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. In the context of defamation actions, the Court has nonetheless provided "special" First Amendment protection to false statements of fact on issues of public concern because "a rule of strict liability that compels

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[6](...continued)
punitive damages are available without a showing of "actual malice" in a libel case brought by a private figure, *regardless* whether the false speech involved a matter of public concern. *Dun & Bradstreet*, 472 U.S. at 762-64 (Burger, C.J., concurring in the judgment); *id.* at 765-74 (White, J., concurring in the judgment).

a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Id.* In order to avoid this chilling effect on the exercise of First Amendment rights, *Gertz* held that a defamation plaintiff must demonstrate "actual malice" (*i.e.*, knowledge of falsity or reckless disregard for the truth) in order to recover presumed or punitive damages based on a showing that the defendant's statements were false. *Id.* at 349-50. The *Dun & Bradstreet* plurality saw no reason to extend that "special protection" to false statements that did not relate to matters of pubic concern because there was "no credible argument" that the absence of such "special protection" would have a chilling effect on truthful speech. *Dun & Bradstreet*, 472 U.S. at 762 (plurality). In particular, the plurality thought truthful credit reporting of the type at issue was "hardy" and thus unlikely to be deterred by "incidental state regulation" of false credit reporting. *Id.* at 762-63 & n.9. In other words, the plurality declined to extend *Gertz* not because it believed that all speech not related to matters of public concern was entitled to reduced First Amendment protection, but because it believed that *false* speech not related to matters of public concern was entitled to *no* First Amendment protection.

Indeed, the plurality would have had little reason to be concerned by the possible chilling effect of its decision on truthful speech "not related to matters of public concern" if it really had believed -- as the D.C. Circuit held -- that all such speech is entitled to only "reduced" First Amendment protection. In sum, *Dun & Bradstreet* -- the *only* decision relied on by the court below in creating a new category of speech to which full First Amendment protection is inapplicable -- provides *no* support for the D.C. Circuit's position.

Moreover, the D.C. Circuit's decision granting reduced First Amendment protection to truthful speech "not related to matters of public concern" -- a category that includes the majority of all speech -- conflicts with numerous decisions of this Court. Indeed, the Court recently reiterated, "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). The Court has repeatedly made clear that, other than speech falling into the very limited categories described above, speech cannot be deemed less deserving of protection based on its subject matter. *See, e.g., Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").[7]

Although the Court has recognized that privacy concerns may properly enter into the First Amendment calculus, in *every* case where privacy interests have come into conflict with First Amendment rights, the Court has refused to allow those interests to trump First Amendment interests in disseminating truthful information and has refused to reduce the level of First Amendment protection based on claims that the information was "private." For example, the Court granted full First Amendment protection to a tort defendant that

[7] It is of no moment that, at least according to the FTC, Congress intended to prohibit the type of speech engaged in by Trans Union in order to protect privacy interests. No deference to such a legislative determination is warranted in a First Amendment case. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

published the name of a rape victim, despite indicating that the victim's name (as distinguished from the fact that the rape occurred) was not a matter of public concern. *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989). Although stating that it did not "rule out the possibility" that, under some circumstances, privacy interests might be sufficient to overcome First Amendment protections and thus to allow imposition of civil sanctions for truthfully disseminating a rape victim's name, *id.* at 537, the Court noted pointedly that "our decisions have *without exception* upheld the press' right to publish" information of only private concern. *Id.* at 530 (emphasis added).[8]

One would be hard-pressed to come up with an example of speech of less "public concern" than the speech at issue in *Hustler Magazine v. Falwell*, 485 U.S. 45 (1988). The speech consisted of a magazine "parody" of an advertisement for Campari Liqueur, in which Rev. Jerry Falwell was the

[8] The Court threw out the tort judgment because, *inter alia*, the Florida statute prohibiting publication of rape victims' names was underinclusive -- it prohibited dissemination by newspapers and the broadcast media but not by others. The Court held that such "underinclusiveness" was fatal under the First Amendment: "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smallest disseminator as well as the media giant." *Id.* at 540. *See also, id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment). The contrast between *Florida Star* and the decision below is particularly striking with respect to the underinclusiveness issue. The D.C. Circuit permitted the FTC to prohibit Trans Union from disseminating its target marketing lists, despite acknowledging that the FTC's prohibition addressed only a small fraction of all marketing lists. Pet. App. 14a-15a.

principal character depicted.[9] The Court nonetheless afforded full First Amendment protection to the parody, and held that the First Amendment prohibited the imposition of liability against the magazine for the tort of intentional infliction of emotional distress, in the absence of evidence that the parody contained any false statements of fact. *Id.* at 55-56. To the extent that the D.C. Circuit intended its decision to apply to all speech that does not relate to matters of public concern, the decision is in clear conflict with *Hustler*.

The decision below is also in conflict with this Court's decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). One of the reasons given by the D.C. Circuit for affording "reduced" First Amendment protection to Trans Union's speech was its limited circulation: Trans Union supplies each of its target marketing lists to a limited number of paying customers. Pet. App. 13a. That rationale directly conflicts with *Givhan*, which held that speech is not to be afforded a lower level of First Amendment protection simply because the speaker chooses not to speak to a wide audience. *Givhan*, 439 U.S. at 414.

In an analogous context, the Court has explicitly rejected the public concern/private concern dichotomy embraced by the D.C. Circuit. One of the issues addressed in *Gertz* was whether to extend the *New York Times v.*

[9] Although the Court deemed Rev. Falwell a "public figure," *Hustler*, 485 U.S. at 57, there was no pretense that the parody was intended as a comment on any public issue; indeed, included at the bottom of the page was the disclaimer, "ad parody -- not to be taken seriously." *Id.* at 48. The parody quoted Rev. Falwell as stating that he had lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse." *Id.*

Sullivan rule to all speech involving matters of "general or public interest." *Gertz* rejected that approach, in part because of the difficulty entailed in determining which communications "address issues of 'general or public interest' and which do not." *Gertz*, 418 U.S. at 346. That concern applies equally here; the D.C. Circuit made no effort to define the contours of speech that does not relate to matters of public concern or how courts should go about distinguishing it from speech that *does* relate to matters of public concern.

This case does not involve an effort by the government to deny access to information. *Cf. Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). Trans Union has lawfully obtained the information on its target marketing lists without assistance from the government. Once information is "lawfully obtained," this Court has allowed "the state [to] punish its publication" only in the rarest of circumstances, even when the information does not relate to a matter of public concern. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).[10]

As noted above, the Court has indicated that it might be willing to permit the suppression of truthful information of a personal nature in rare circumstances, such as where the release of information might be intensely embarrassing. *Florida Star*, 491 U.S. at 537 (disclosure of name of rape

[10] In *Smith*, the information at issue was the name of an individual being charged as a juvenile offender. That information was kept confidential by the state (as was routine in all juvenile proceedings), but a newspaper had obtained the name using "routine newspaper reporting techniques." *Id.* at 183.

victim).[11] But it has never suggested that privacy concerns should ever result in speech restrictions being judged under some lowered First Amendment standard. Nor has it suggested that truthful speech can be suppressed entirely based on the rather minor intrusions on privacy caused by Trans Union's dissemination of the names and addresses of consumers. The D.C. Circuit's holding to the contrary cuts against a long line of First Amendment decisions from this Court. The Court should grant review in order to resolve that conflict.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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[11] In general, courts have been more willing to suppress truthful speech on "intense embarrassment" grounds when the speech takes the form of photographs or recordings. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (Posner, J.) (picture of an individual using a bathroom stall); *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998) (unauthorized broadcast of a tape of a private sexual encounter between a famous actress and a rock star). The mere publication of embarrassing but truthful *facts* generally has been insufficient for the imposition of liability. *See, e.g., Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940) (embarrassing facts about a former child prodigy later found living as an eccentric recluse). *See generally*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS, § 117, at 857 (5th ed. 1984).